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In the Supreme Court of the United States

CELESTINE FAULKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS A. BERMAN
Ohio State University
Moritz College of Law
55 West 12th Ave.
Columbus, OH 43210
(614) 688-8690

ANDREW S. BUZIN
Counsel of Record
500 Fifth Ave.
45th Floor
New York, NY 10110
(212) 292-2679

AARON M. KATZ
Ropes & Gray LLP
One International Place
Boston, MA 02110
(617) 951-7117

CARISSA B. HESSICK
Griswold 1 North
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 384-7876

Counsel for Petitioner

QUESTIONS PRESENTED

In 1998, following a jury conviction, Judge Rebecca Beach Smith sentenced Celestine Faulks to the Guidelines-maximum term of 30 months in prison and five years' supervised release. Seven years later, as Faulks's term of supervision was nearing completion, a federal probation officer alleged that Faulks had committed a state crime in violation of a condition of her release. Faulks denied the allegation. At a revocation hearing under 18 U.S.C. § 3583, Judge Smith decided disputed questions of identity, *actus reus*, *mens rea*, and witness credibility using a civil standard of proof. Judge Smith found Faulks guilty of the alleged offense and sentenced her to a three-year term of imprisonment. This case presents two questions:

1. Whether a federal judge may, consistent with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), impose upon a former federal offender a new three-year term of imprisonment based solely on the judge's disputed factual findings, by a preponderance of the evidence, that the former offender committed a state offense during her term of supervised release.

2. Whether proceedings in which federal judicial officials initiate, investigate, and adjudicate disputed allegations that a former federal offender has violated a condition of supervised release by committing a state offense violate the constitutional guarantees of the Fifth and Sixth Amendments as set forth in *Apprendi*, *Blakely*, and *Mine Workers* v. *Bagwell*, 512 U.S. 821 (1994).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Celestine Faulks respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in United States v. Faulks, No. 05-5168, 2006 U.S. App. LEXIS 23797, 2006 WL 2683300 (4th Cir. Sept. 19, 2006).

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit filed its opinion on September 19, 2006. On December 12, 2006, the Chief Justice extended the

time within which to file a petition for a writ of certiorari up to and including January 17, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor [shall] be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The federal supervised release statute now provides that a district court may revoke a term of release and impose a new term of imprisonment "if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release." 18 U.S.C. § 3583(e)(3).

STATEMENT OF THE CASE

This case raises questions concerning the constitutionality of a sentencing procedure that affects thousands of defendants in the federal and state systems and over which the federal and state courts are in conflict.

In 1998, a jury convicted petitioner Celestine Faulks of one count of conspiracy to defraud a

financial institution and one count of bank fraud. Judge Rebecca Beach Smith sentenced Faulks to 30 months' imprisonment on each count—the maxima available under the then-mandatory Sentencing Guidelines—to be followed by a five-year term of supervised release.[1] The court also recommended that Faulks participate in a "program for mental counseling for fraud mind-set."

On July 5, 2000, Faulks was released from federal custody after fully serving her term of imprisonment and commenced her five-year term of supervised release. On May 16, 2005, with less than two months remaining on Faulks's term of supervision, a federal probation officer filed a "Petition on Supervised Release" accusing Faulks of having violated various criminal statutes of the Commonwealth of Virginia in January 2005.[2] Because one condition of Faulks's release was that she "not commit a[] . . . State . . . crime during the term of supervision," 18 U.S.C. § 3583(d), the petition requested that the court revoke Faulks's supervised release.

The district judge signed the probation officer's charging petition and summoned Faulks to appear. On November 9, 2005, approximately four months after Faulks's term of supervision had expired, Judge Smith—the same federal district judge who had sentenced Faulks for her fraud convictions

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[1] The court ordered that the sentences run concurrently.

[2] Faulks's federal probation officer filed the petition after Faulks was indicted in state court for allegedly passing bad checks. Virginia never tried Faulks on these charges, and the charges were dismissed with prejudice on the state's motion.

nearly a decade before—conducted a hearing to determine whether Faulks had, in fact, committed the state offenses of which the probation officer had accused her. See 18 U.S.C. § 3583(e)(3) (providing that a court may revoke an ex-offender's term of supervised release and impose a new term of imprisonment if and only if the court "finds by a preponderance of the evidence that [she] violated a condition of supervised release").

At the hearing, Faulks vigorously denied all of the probation officer's allegations[3] and requested that the federal hearing be stayed until the charges against her could be resolved through traditional trial procedures.[4] Judge Smith rejected this request, remarking that a federal revocation hearing involves "a totally different burden of proof. The burden of proof on federal violations is by a preponderance of the evidence. The burden of proof in a criminal trial is beyond a reasonable doubt."

The revocation hearing proceeded as a makeshift trial. More than a dozen witnesses testified under oath, with Judge Smith frequently directing

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[3] Faulks's denial that she committed any violation of the conditions of her supervised release distinguishes this case from *United States* v. *Keel*, 164 Fed. Appx. 958 (11th Cir.), *cert. denied*, 127 S. Ct. 62 (2006). In *Keel*, the defendant admitted to committing several violations of the conditions of his release. See 164 Fed. Appx. at 959-60. Thus, the defendant's admitted conduct provided the basis for his exposure to imprisonment under Section 3583(e)(3).

[4] Specifically, Faulks requested that the charges in the Virginia indictment be adjudicated in state court before any determination was made concerning her conduct while on supervised release.

questions to them. Faulks presented five exculpatory witnesses. She also testified on her own behalf, repeatedly asserting her innocence and suggesting that the allegations against her were a result of mistaken identity. Judge Smith aggressively questioned Faulks during her testimony and, acting *sua sponte*, called Faulks's probation officer as a witness to explore the veracity of Faulks's testimony about her physical disability.

At the conclusion of the hearing, Judge Smith, after noting that Faulks was "not a newcomer to this court or to this judge," decided disputed issues of identity,[5] *actus reus*,[6] *mens rea*,[7] and witness credibility[8] just as a petit jury traditionally would. Stating that she did not "believe anything Ms. Faulks said on the stand today," Judge Smith found by a preponderance of the evidence that Faulks had committed the state law offenses alleged by the probation officer. In so ruling, Judge Smith

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[5] Reviewing a photograph taken by a security camera at an automated teller machine, Judge Smith stated, "I'm looking right at the picture . . . . The eyes, the nose—that's Ms. Faulks."

[6] Analyzing the signature on an allegedly fraudulent check, Judge Smith stated, "this is not [the account holder's] signature on here . . . it had to be forged, and it . . . had to be forged by Ms. Faulks."

[7] In describing her findings of fact, Judge Smith stated that Faulks "knew [the fraudulent checks] were going into an account of [an accomplice]."

[8] Though she stated that Faulks's testimony didn't "ring with credibility to a judge," Judge Smith stated that she found a government witness "particularly credible."

expressly referenced Faulks's 1998 federal conviction and stated that Faulks still had the "fraud mentality" that the court had observed while sentencing her for the 1998 offense.

After "convicting" Faulks of violating Virginia law, Judge Smith revoked Faulks's term of supervised release and sentenced her to a new term of imprisonment of 36 months. Unless this sentence is vacated, Faulks will end up serving more time in prison than she possibly could have as a result of her 1998 conviction—solely on the basis of Judge Smith's 2005 finding, by a preponderance of the evidence, that Faulks violated Virginia state law.

On appeal, Faulks argued, *inter alia*, that the imposition of a new 36-month term of imprisonment based solely on the judge's finding on a disputed issue of fact contravened this Court's decisions in *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). The Fourth Circuit affirmed in an unpublished decision, see *United States* v. *Faulks*, No. 05-5168, 2006 U.S. App. LEXIS 23797, 2006 WL 2683300 (4th Cir. Sept. 19, 2006), holding that, "'[b]ecause the revocation of supervised release and the subsequent imposition of additional imprisonment is . . . fully discretionary, it is constitutional under *Booker*.'" See Appendix A, at 2a-3a (quoting *United States* v. *Huerta-Pimental*, 445 F.3d 1220, 1224 (9th Cir. 2006)).

REASONS FOR GRANTING THE PETITION

This Court should grant a writ of certiorari to determine the impact of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), on the supervised release scheme originally created by the Sentencing Reform Act of 1984 ("SRA") and later amended to authorize the imposition of a new term of imprisonment for violations of the conditions of release. In its current form, the statute permits a judge to impose a new term of imprisonment upon a former offender based solely on the judge's finding "by a preponderance of the evidence that the defendant violated a condition of supervised release." 18 U.S.C. § 3583(e)(3).

The federal courts of appeals have recognized the "tension" between the current "supervised release scheme [and] the rationale of *Blakely*," *United States* v. *McNeil*, 415 F.3d 273, 276-77 (2d Cir. 2005), and the circuits have adopted four implausible and conflicting approaches in holding that Section 3583(e)(3) is exempt from *Blakely*'s mandates. The disparate federal rulings also conflict with state court decisions holding that *Blakely* prohibits a judge from imposing imprisonment based on disputed factual findings concerning an ex-offender's violation of the conditions of release.[9] This case, in which the Fifth and Sixth Amendment issues are preserved and squarely presented, provides a fitting

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[9] Several states employ post-release supervision regimes that are indistinguishable from the federal system. Without intervention by this Court, these states will be unable to legislate with an adequate understanding of the constitutional rules that govern the imposition of a term of confinement on an ex-offender based upon alleged violations of release conditions.

vehicle for resolving these conflicts and for clarifying the constitutional rules governing the imposition of a term of confinement following the revocation of supervised release.

I. THIS COURT SHOULD ADDRESS THE CONSTITUTIONAL QUESTIONS THAT NOW SURROUND IMPRISONMENT IMPOSED FOLLOWING REVOCATIONS OF SUPERVISED RELEASE UNDER SECTION 3583(e)(3).

Having abolished federal parole, in 1984 Congress enacted the SRA, which created a new system of post-imprisonment supervision of ex-offenders known as "supervised release." As the Senate Committee on the Judiciary noted, the text of the SRA clearly provided that supervised release was to be, "unlike . . . parole," "a separate part of the defendant's sentence"; under the SRA, "a prisoner has completed his prison term when released even if he is released to serve a term of supervised release." S. Rep. No. 98-225, at 58, 123 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3241, 3306. As the Committee also noted, supervised release was not to be "imposed for purposes of punishment or incapacitation since those purposes [were to be served] to the extent necessary by the term of imprisonment." *Id.* at 125, 1984 U.S.C.C.A.N. at 3308.

Accordingly, the SRA did not provide for revocation of supervised release. Rather, Section 3583(e)(3) as originally enacted provided that courts should "treat a violation of a condition of a term of supervised release as contempt of court pursuant to

Section 401(3) of Title 18." *Id.*[10] The cross-reference to Section 401(3) was critical, for Congress has provided that, in a criminal contempt proceeding, an ex-offender is entitled to a trial by jury. See 18 U.S.C. § 3691 (a defendant tried under Section 401(3) "shall be entitled to trial by a jury"). And this Court has held that the Fifth and Sixth Amendments require a jury in the type of criminal contempt proceeding that Congress initially provided to address allegations that a defendant had violated conditions of release. See *Mine Workers* v. *Bagwell*, 512 U.S. 821, 826 (1994).

Congress, through the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, § 1006(a)(3), subsequently amended Section 3583(e) to authorize revocation of supervised release and imposition of a new term of imprisonment *without* a jury trial. This change was not prompted by the Sentencing Commission. See Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 24 n.121 (1988) (noting that the Anti-Drug Abuse Act of 1986 was among a group of "statutory

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[10] This omission was intentional. The Senate Committee explained that, if an ex-offender were believed to have violated a condition of release, the court could (1) adjust the ex-offender's release conditions; (2) hold the ex-offender "pending trial if the violation is a new criminal offense"; or (3) treat such "violation . . . as contempt of court . . . and . . . carry out the appropriate contempt proceedings and sanctions as specified in 18 U.S.C. § 401." S. Rep. No. 98-225, at 58, 125, 1984 U.S.C.C.A.N. at 3241, 3308. See also *id.* ("The Committee did not provide for revocation proceedings for violation of a condition of supervised release because . . . it believes that . . . the fact that a defendant is charged with a new offense" would address such violations).

changes[] over which the Commission had no control"). The practical effect of these amendments was to authorize an end-run around the historical protections that this Court later recognized as constitutionally essential in *Bagwell*. See 512 U.S. at 826-27 (explaining that penalties for criminal contempt "may not be imposed on someone who has not been afforded the protections that the Constitution requires" for criminal proceedings).

Though this Court has considered many constitutional issues related to sentencing reform over the last two decades, see, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361 (1989), it has never examined the provision that now authorizes federal judges, acting alone, to impose a new term of imprisonment under Section 3583(e)(3). In particular, this Court has not yet considered the implications of *Apprendi* and *Blakely* for Section 3583(e)(3)'s provision authorizing an Article III judge to revoke a term of release and impose a new term of imprisonment if and only if the judge "finds by a preponderance of the evidence that the defendant violated a condition of supervised release."

Constitutional questions surrounding the judicial imposition of new terms of imprisonment under Section 3583 have arisen repeatedly in the federal courts of appeals since this Court's decision in *Blakely*. See Part II.A, *infra*. These questions will continue to arise, as federal defendants are regularly sentenced to terms of supervised release upon conviction.[11] In addition, the number of persons

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[11] At the end of 2003, more than 76,000 federal offenders were serving a term of supervised release. See Bureau of Justice Statistics, Federal Justice Statistics, *available at* http://www.ojp.usdoj.gov/bjs/fed.htm (Dec. 28, 2006).

serving terms of supervised release is likely to increase given recent legislation that authorizes a lifetime term of supervised release for a broad array of offenses and empowers judges to impose longer terms of imprisonment following revocation. See Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 670, § 101; see also Douglas A. Morris, FYI: Supervised Release and How the PROTECT Act Changed Supervised Release, 18 Fed. Sent. Rep. 182, 182-84 (2006).

In addition, a number of states have adopted post-release supervision schemes that implicate the same constitutional questions arising from the operation of Section 3583(e)(3) in this case. See Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190, 1199-1201 (2005) (describing the implementation of supervised release systems in the States). Predictably, the courts in these states are also struggling to resolve the constitutional issues raised here.

In *Apprendi*, this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Blakely*, this Court held that a defendant's term of imprisonment may not exceed that which a "judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303 (emphasis in original); accord *Booker*, 543 U.S. at 244. These holdings enforce constitutional guarantees of "surpassing importance," *Apprendi*, 530 U.S. at 476, and affirm

that the jury-trial right is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306. Foreshadowing the issues raised here, the *Blakely* Court warned against the imposition of punishment not "based not on facts proved to [a defendant's] peers beyond a reasonable doubt, but on facts extracted . . . from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." *Id.* at 312.

This case involves the straightforward application of *Apprendi* and *Blakely* to Section 3583(e)(3). Because Section 3583(e)(3) authorizes a court, based solely on judicial factfinding, to impose punishment not authorized by the jury's verdict, that provision can, as this case demonstrates, operate in a manner that contravenes *Apprendi* and *Blakely*.[12] Nevertheless, the federal courts of appeals and the courts of the States are in conflict with respect to whether *Blakely* requires the fact of a violation of a condition of release to be found by a jury where the

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[12] This distinguishes supervised release from traditional forms of parole, in which the state releases the defendant from confinement prior to the expiration of her term of imprisonment. See, *e.g.*, United States Sentencing Guidelines Manual, Chapter 7, Part A ("Unlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court."); S. Rep. No. 98-225, at 58, 122-23, 1984 U.S.C.C.A.N. at 3241, 3305-06 ("Under 18 U.S.C. § 4210(a), a parolee remains in the legal custody . . . of the Attorney General until the expiration of the maximum term or terms of imprisonment to which he was sentenced . . . [T]he revocation [of parole] has the effect of requiring the parolee to serve the remainder of his original term of imprisonment . . . .").

court is empowered to impose a new term of imprisonment on the basis of the alleged violation. This case presents the opportunity to resolve that conflict. The Sixth Amendment issue is squarely presented in stark terms: Faulks had fully served the term of imprisonment that Judge Smith imposed on the basis of her 1998 conviction. Almost a decade later, in a closed hearing governed by procedures that were a poor substitute for those traditionally used to adjudicate criminal allegations, Judge Smith imposed a new term of imprisonment based solely upon the judge's factual finding, by a preponderance of the evidence, that Faulks had committed a state law crime, a charge that Faulks vigorously denied and for which Virginia has never prosecuted her. Unless this new term of imprisonment is vacated, Faulks will serve more time in prison than she possibly could have on the basis of the jury's verdict alone.

The operation of Section 3583(e)(3) in this case clearly contravened the holding in *Blakely*. The only question in this case is whether new terms of imprisonment imposed pursuant to revocations of supervised release are to be exempt from the mandates set forth in *Apprendi* and *Blakely*. The facts of this case—in which Faulks was "convicted" of a state crime tried to a federal judge—illustrate the dangers of permitting the circumvention of protections of "surpassing importance," *Apprendi*, 530 U.S. at 476, by resort to summary administrative procedures that deprive defendants of their constitutionally guaranteed right to trial by jury.

II. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN FEDERAL AND STATE COURTS AS TO THE EFFECT OF *BLAKELY* ON NEW TERMS OF IMPRISONMENT AUTHORIZED SOLELY BY JUDICIAL FACTFINDING AT REVOCATION PROCEEDINGS.

Eight federal courts of appeals have struggled with the constitutionality of Section 3583(e)(3) in light of *Blakely*. In an apparent effort to preserve broad judicial sentencing power in the context of supervised release revocations unless this Court expressly directs otherwise, see *McNeil*, 415 F.3d at 277 ("We are not inclined to [apply] *Blakely* to an area of law that is up to now undisturbed."), these courts have developed a variety of inconsistent doctrines in sanctioning the imposition of new terms of imprisonment based on judicial factfinding under Section 3583(e)(3). Perhaps because the text of Section 3583(e)(3) clearly violates the *Blakely* holding, the courts of appeals have become badly divided in their efforts to resolve the undeniable "tension" between "the supervised release scheme [and] the rationale of *Blakely* and *Booker*." *McNeil*, 415 F.3d at 276. And, as demonstrated below, the federal courts of appeals' varied responses to the question raised here directly conflict with those provided by the courts of the States.

A. None of the Circuits' Conflicting Theories for Exempting Imprisonment Based on Judicial Factfinding at Section 3583(e) Proceedings From *Blakely*'s Mandates Withstands Scrutiny.

The courts of appeals have produced four conflicting, unpersuasive theories in their efforts to exempt from *Blakely* the imposition of terms of imprisonment based solely on judicial factfinding at supervised release revocation proceedings.

1. *The* Johnson *approach.* Three circuits have stated that this Court's decision in *Johnson* v. *United States*, 529 U.S. 694, 700 (2000), forecloses the argument that the Sixth Amendment's jury-trial right applies in the revocation context. See *United States* v. *Dees*, 467 F.3d 847, 853 (3d Cir. 2006); *United States* v. *Hinson*, 429 F.3d 114, 119 (5th Cir. 2005); *United States* v. *Work*, 409 F.3d 484, 491 (1st Cir. 2005). Indeed, the Fifth Circuit has characterized *Johnson* as holding "that a violation of supervised release may be found by a judge applying a preponderance of the evidence standard." *Hinson*, 429 F.3d at 119. As the Second Circuit recognized in rejecting this view, however, *Johnson* was decided before *Apprendi* and *Blakely* and merely addressed a narrow question of statutory interpretation with potential *Ex Post Facto* Clause implications. See *United States* v. *Carlton*, 442 F.3d 802, 809 (2d Cir. 2006) (concluding that neither *Johnson*'s holding nor its reasoning resolves the Sixth Amendment question presented here). Indeed, because "[d]uring [his] revocation hearing, Johnson *admitted* that he had violated the terms of his original supervised

release," see *United States* v. *Johnson*, No. 98-5664, 1999 U.S. App. LEXIS 8558, at *2, 1999 WL 282679, at **1 (6th Cir. April 29, 1999) (emphasis added), there was no basis for Johnson to raise, or for this Court to consider, a Sixth Amendment challenge to the new term of imprisonment imposed following revocation of his term of release.[13]

2. *The parole approach.* Three circuits have rejected the Sixth Amendment claim presented here by extending dictum from this Court's opinion in *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1975) ("[T]he full panoply of rights due a defendant in [a criminal] proceeding does not apply to *parole* revocations" (emphasis added)), to the supervised release context. See *Carlton*, 442 F.3d at 807; *Huerta-Pimental*, 445 F.3d at 1225; *Work*, 409 F.3d at 491. These decisions fail to recognize that the *Morrissey* Court reversed the revocation of the petitioner's parole on due process grounds[14] and thus had no occasion to

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[13] Moreover, Johnson's release was revoked only *after* a Virginia jury convicted him of forgery charges in state court. See *Johnson*, 529 U.S. at 697. Thus, any Sixth Amendment challenge would have been without merit. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 233 (1998).

[14] *Morrisey* noted that application of the Due Process Clause to revocation would not cause undue inconvenience because "a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime." 408 U.S. at 490. Application of *Apprendi* to revocation of supervised release is similarly unlikely to impose undue costs. Compare *Booker*, 543 U.S. at 272 (Stevens, J., dissenting) ("[T]he judge could have considered Booker's [prior convictions] without violating the Sixth Amendment."). Faulks's revocation, however, was based not on a prior conviction but on Judge Smith's finding that she had violated a condition of her release.

address what constitutional guarantees are *not* due in revocation proceedings. More importantly, these decisions completely ignore that supervised release is fundamentally distinguishable from parole for *Blakely* purposes. See note 12, *supra*. As a panel of the Second Circuit noted in rejecting the parole theory, "parole (unlike supervised release) is an interval during which the defendant could continue to be held in prison based on his original conviction alone; so the decision to grant or revoke parole only affects the time served in prison within the parameters of the prison sentence originally authorized by the crime of conviction." *McNeil*, 415 F.3d at 276-77.

3. *The* Booker *dictum approach.* Four circuits, including the Fourth Circuit in this case, have relied on the passing reference to the supervised release statute in the *Booker* remedial opinion, 543 U.S. at 257 ("Most of the [Act] is perfectly valid." (citing, *inter alia*, 18 U.S.C. § 3583)), for the proposition that the imposition of new terms of imprisonment on the basis of judicial factfinding pursuant to Section 3583(e)(3) remains constitutional. See Appendix A, at 2a; *United States* v. *Coleman*, 404 F.3d 1103, 1104 (8th Cir. 2005) (per curiam); *Hinson*, 429 F.3d at 117; *McNeil*, 415 F.3d at 276. As at least one circuit has recognized, however, this dictum—which referred only to Section 3583 generally and did not consider whether Section 3583(e)(3) could present constitutional problems as applied—neither addresses nor controls the Sixth Amendment question presented here. See *United States* v. *Echarte*, 136 Fed. Appx. 347, 348 (11th Cir. 2005) ("[T]he Supreme Court had no instance [in *Booker*] to address the Sixth Amendment implications of 18

U.S.C. § 3583(e)"); see also *Carlton*, 442 F.3d at 808-09.

The Fourth Circuit, in its opinion below, concluded that Section 3583(e)(3) remains constitutional because revocation is "fully discretionary." See Appendix A, at 2a-3a. But a district court is entitled to revoke a former offender's supervised release and impose a new term of imprisonment if—*and only if*—the court finds as a fact that she violated a condition of supervision. That a court retains the discretion *not* to revoke a former offender's release in those instances is simply irrelevant for purposes of *Apprendi* and *Blakely*. As the *Apprendi* Court explained, "the relevant inquiry is one . . . of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 530 U.S. at 494; see also *Blakely*, 542 U.S. at 305 n.8. In this particular case, in which Section 3583(e)(3) authorized the imposition of a term of imprisonment solely on the basis of a judge's disputed factual finding, the answer clearly is "yes."

4. ***The surrender approach.*** Having rejected the "assurances" of a prior panel of the Second Circuit, as well as those of the First, Fifth, and Eighth circuits, that *Blakely* does not apply to revocation proceedings, see *Carlton*, 442 F.3d at 808, a panel of the Second Circuit has reached the striking conclusion that, once convicted, a defendant "*surrender[s]* the due process rights articulated by *Apprendi* and its progeny." *Carlton*, 442 F.3d at 809 (emphasis added). This theory directly contradicts this Court's decisions regarding Sixth Amendment waiver, see *Carnley* v. *Cochran*, 369 U.S. 506, 516 (1962) ("Presuming waiver [of Sixth Amendment

rights] from a silent record is impermissible."), and, if adopted by this Court, logically would reverse the outcomes in *Apprendi*, *Blakely*, and *Booker* themselves.[15]

B. The Federal Circuits' Holdings Conflict with Those of State Courts That Have Applied *Blakely* to New Terms of Imprisonment Based on Judicial Factfinding at Revocation Proceedings.

The federal courts of appeals' responses to the question raised here directly conflicts with the decisional law of at least one state. In rejecting the argument that *Apprendi* and *Blakely* do not apply to sentences authorized solely by judicial factfinding where the sentence could be imposed at a subsequent revocation proceeding, the Oregon Court of Appeals has explained:

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[15] Because "[s]upervised release . . . is not a punishment in lieu of incarceration," *United States* v. *Granderson*, 511 U.S. 39, 50 (1994), Faulks's new sentence cannot be justified on the ground that a defendant voluntarily "exchanges" her Sixth Amendment rights in order to serve a shorter term of imprisonment than has already been imposed. This theory could apply in the parole context, in which the defendant does not serve the full term of imprisonment imposed at sentencing. See *Morrissey*, 408 U.S. at 480. But it does not apply to supervised release, which commences after the defendant has already served the full term of imprisonment imposed on the basis of the jury's verdict. See S. Rep. No. 98-225, at 58, 1984 U.S.C.C.A.N. at 3241 ("Under [the SRA], a prisoner has completed his prison term when released even if he is released to serve a term of supervised release.").

> [Under the pertinent Oregon statute,] a trial court may, in its discretion, revoke an offender's probation if it finds that the offender has . . . violated the terms of his probation . . . . A court's authority to revoke probation is therefore entirely contingent on the existence of facts that, by their nature, can occur only *after* the offender has already been sentenced . . . . [I]f [the defendant's] presumptive sentence is probation, then the relevant statutory maximum, as that term is defined in *Blakely*, is the appropriate period of probation, and nothing more. At that point, the court lacks the authority to impose anything more in the absence of additional factfinding . . . . Such factfinding must conform to the requirements elucidated in *Blakely* and *Apprendi*. That is not what occurred here.

State v. *Buehler*, 136 P.3d 64, 65 (Ore. App. 2006). The reasoning of *Buehler* is in direct conflict with that of the federal courts of appeals. Had the Fourth Circuit applied *Buehler*'s reasoning in this case, it would have been compelled to vacate the 36-month term of imprisonment imposed on Faulks based solely on Judge Smith's finding that Faulks had violated the conditions of her release. Conversely, if the *Buehler* court had been persuaded by any one of the myriad rationales set forth by the federal circuits in addressing this issue, it would have been compelled to affirm Buehler's sentence.

Oregon is not alone is recognizing that there is no principled basis for exempting sentences based solely on judicial factfinding at revocation proceedings from *Blakely*'s mandates. In *State* v. *Beaty*, 696 N.W.2d

406, 412 (Minn. App. 2005), the Minnesota Court of Appeals vacated a sentence authorized in part by judicial factfinding at Beaty's revocation proceeding, holding that the trial court's consideration of facts found at the revocation hearing violated *Blakely*. The necessary premise of *Beaty* is that *Blakely* prohibits the imposition of sentences authorized even in part by judicial factfinding at a revocation proceeding, rendering *Beaty* diametrically opposed to the decisions of the federal circuits that have exempted revocation proceedings from *Blakely*. Compare, *e.g.*, *Carlton*, 442 F.3d at 807.

State courts in Tennessee, North Carolina, and Ohio also have expressed uncertainty with respect to the dubious constitutional validity of sentences imposed on the basis of judicial factfinding at revocation proceedings. In *State* v. *France*, No. E2003-01293, 2004 Tenn. Crim. App. LEXIS 642, 2004 WL 1606987 (Tenn. Crim. App. July 19, 2004), decided just weeks after *Blakely*, the Tennessee Court of Criminal Appeals stated that *Blakely* "calls into question the continuing validity of [the state's] current sentencing scheme" that authorizes "revocation of a Community Corrections sentence" based on judicial factfinding. And in *State* v. *McMahan*, 621 S.E.2d 319, 322 (N.C. App. 2005), and *State* v. *Gibson*, No. 05-COA-032, 2006 Ohio App. LEXIS 3996, 2006 WL 2256994 (Ohio App. Aug. 8, 2006), state courts allowed defendants to belatedly challenge, on *Blakely* grounds, suspended sentences activated on the basis of judicial factfinding at revocation hearings. The relaxation of ordinarily rigorous procedural default rules in *McMahan* and *Gibson* demonstrates that state courts have sought to avoid completely the difficult

constitutional issues raised by this case.

The confused decisions of the federal courts of appeals as to *Blakely*'s effect on a sentence imposed solely based on facts found by a judge at a revocation proceeding are in conflict with the law of the states, and this conflict can only be resolved by this Court's intervention. Indeed, because the fractured logic of the federal circuits reflects present—and portends future—deeper inter-circuit conflicts on when and how *Blakely* impacts judicial sentencing authority, the circuits' confused and conflicted jurisprudence on this issue alone provides sufficient reason to grant the writ. This Court's intervention will be particularly helpful to state legislatures, which currently face substantial constitutional uncertainty with respect to the validity of post-release supervision schemes under *Blakely*.

III. THE DECISION BELOW IS IRRECONCILABLE WITH THIS COURT'S HOLDINGS IN *APPRENDI* AND *BLAKELY*.

In *Apprendi* this Court held that, under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Blakely*, the Court clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303 (emphasis in original).

Faulks's imprisonment pursuant to Section 3583(e)(3) was in direct contravention of *Blakely*.

Faulks's 1998 conviction authorized a maximum sentence under the then-mandatory Guidelines of 30 months' imprisonment on each of the two counts of conviction. The district judge sentenced Faulks to 30 months' confinement on each count. Faulks then fully served her sentence in federal prison. Nearly a decade later, based on a petition filed by a probation officer with less than two months remaining on Faulks's term of release, the same judge imposed a new 36-month term of imprisonment based solely on the judge's disputed factual finding that Faulks had violated Virginia law. Had the district court not found that Faulks had committed the alleged state offense, it could not have imposed this, or indeed *any*, term of imprisonment.[16] Compare *Keel*, 164 Fed. Appx. at 958; see also note 3, *supra*.

The Court has reiterated consistently that its fidelity to the *Apprendi* rule is motivated "by the need to preserve Sixth Amendment substance." *Booker*, 543 U.S. at 237. The circuits' varied efforts to exempt supervised release revocation from the

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[16] The parallels to *Apprendi* itself are striking. Apprendi was found guilty of an initial statutory offense and a distinct statutory provision authorized the sentencing judge, in a subsequent and separate proceeding, to make a further factual finding by a preponderance of the evidence that authorized an increase in the legally available penalty. Compare N.J. Stat. Ann. § 2C:44-3(e) (authorizing a sentencing court to impose "an extended term of imprisonment if [the court] finds . . . by a preponderance of the evidence" that the defendant acted with a certain purpose), with 18 U.S.C. § 3583(e)(3) (authorizing a district judge to "require the defendant to serve [a new term of imprisonment] if the court . . . finds by a preponderance of the evidence that the defendant violated a condition of supervised release").

Sixth Amendment has led to this curious result: A federal judge is prohibited from imposing additional incarceration based solely on judicial factfinding when the defendant is *initially* sentenced, but the same judge may do just that at a subsequent revocation proceeding. Revocation of supervised release commonly results in substantial terms of incarceration unauthorized by jury findings. It is difficult to see how "Sixth Amendment substance" is served by a rule that prohibits a sentencing practice at one point in time but permits it at another. Simply put, there is no principled basis for exempting Section 3583(e)(3) from *Apprendi*'s mandates. See *Ring* v. *Arizona*, 536 U.S. 584, 613 (2002) (Kennedy, J., concurring) ("*Apprendi* is now the law, and its holding must be implemented in a principled way.").

This Court's pre-*Apprendi* holding in *Johnson* v. *United States* does not alter this conclusion. In *Johnson*, this Court granted review to address whether an amendment to Section 3583 violated the *Ex Post Facto* Clause. The Court noted that, although a lower court's view that "revocation of supervised release 'imposes punishment for defendants' new offenses'" had "intuitive appeal," "serious constitutional questions . . . would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release." *Johnson*, 529 U.S. at 699-700. In particular, the Court pointed to the constitutional questions raised by Section 3583(e)(3)'s provision that "the violative conduct [on which revocation is based] . . . need only be found by a judge under the preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.* (citing 18

U.S.C. § 3583(e)(3)). The Court avoided this Sixth Amendment problem by adopting the formalistic view that "postrevocation penalties [are attributable] to the original conviction." *Id.* at 701.

Johnson, however, was decided before *Apprendi*, *Blakely*, and *Booker*.[17] Even assuming that a Sixth Amendment holding could be wrenched from Johnson—which avoided any constitutional ruling through statutory construction—the latter decisions reject the notion that formally associating additional punishment with a previous criminal proceeding permits a court to punish a defendant solely on the basis of facts found by a judge. In *Apprendi*, the Court explained that, when determining whether a particular punishment implicates the Sixth Amendment, "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 530 U.S. at 494. In *Blakely*, the Court rejected the view that judicially authorized increases in punishment could be justified by the original conviction, explaining that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303 (emphasis in original). And in *Booker*, the Court reiterated that, "'[i]f a State makes an increase in a

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[17] Every court of appeals to address the issue has concluded that *Blakely* announced a new rule for purposes of collateral retroactivity. See, *e.g.*, *Lloyd* v. *United States*, 407 F.3d 608, 613 (3d Cir. 2005) (collecting cases). The United States adopted this position in its filing with this Court in *Burton* v. *Stewart*. See Brief for the United States as *Amicus Curiae* in *Burton* v. *Stewart*, No. 05-9222 (U.S. 2006), at 9-17 & n.5.

defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." 543 U.S. at 231 (quoting *Ring*, 536 U.S. at 602).

Thus, after *Apprendi* and *Blakely* it is simply irrelevant whether the punishment imposed for violating a condition of supervised release "relates back" to the original conviction—just as it is irrelevant whether punishment authorized by a sentencing enhancement "relates back" to the defendant's conviction for the underlying crime. Faulks's new term of imprisonment was not authorized by the facts found by her jury; it was imposed at the instance of a judge acting alone. *Johnson* simply does not speak to Faulks's Sixth Amendment claim.

IV. THE FACTS OF THIS CASE DEMONSTRATE THE DANGER IN EXEMPTING SENTENCES IMPOSED BASED ON JUDICIAL FACTFINDING AT SECTION 3583(e) PROCEEDINGS FROM THE STRICTURES OF THE FIFTH AND SIXTH AMENDMENTS.

The Fifth Amendment provides that "[n]o person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor [shall] be deprived of life, liberty, or property, without due process of law"; the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The facts of this case—especially considered in light of the plain text of the

Fifth and Sixth Amendments—vividly demonstrate the fundamental constitutional flaws in the factfinding procedure that authorized the imposition of a new term of imprisonment upon Faulks.

The charges against Faulks were never presented to a federal grand jury and, although she was exposed to significant additional prison time, her innocence was not adjudged by an impartial jury of her peers. Rather, the same federal judge who had presided over Faulks's 1998 trial conducted a judicial inquisition during which she reviewed evidence and, as a jury traditionally would, decided disputed questions of identity, *actus reus*, *mens rea*, and witness credibility. Using a civil standard of proof, the judge found Faulks guilty of a state-law crime and, based on this finding, sentenced her to a new three-year term of imprisonment. These procedures are unambiguously prohibited by the text of the Fifth and Sixth Amendments.

As the *Blakely* Court pointed out, the jury-trial right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." 542 U.S. at 306. The procedures in Faulks's case contrast starkly with the *Blakely* Court's vision: the citizenry never participated in the initiation or investigation of the charges against Faulks, and the people had no role in the deprivation of her liberty ordered by a single member of the federal judiciary.

As the facts of this case show, the need for a petit jury is particularly manifest when a jurist has ruled in previous criminal proceedings implicating the

defendant. Judge Smith was privy to evidence that a petit jury could not have considered in assessing Faulks's guilt or innocence. See, *e.g.*, Fed. R. Evid. 404(b). This is why the Framers provided that only a newly empaneled jury of her peers, and not a jurist with knowledge of her past, could authorize additional punishment for Faulks.

Ultimately, Section 3583(e)(3) in its current form seeks to avoid the historical principles recognized in *Bagwell* through use of the term "revocation," as opposed to "criminal contempt," to describe the proceedings that authorized Faulks's new term of imprisonment. This Court has since made clear that "'labels do not afford an acceptable answer'" to the constitutional questions raised by punishment based on judicial factfinding. *Apprendi*, 530 U.S. at 494.

"That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers," "[a]nd it is worse still for that person to conduct the adjudication without affording the protections usually given in criminal trials." *Bagwell*, 512 U.S. at 840 (Scalia, J., concurring). Yet Faulks was ordered to serve a term of imprisonment imposed by the same judge who set the conditions of her release and found that she had violated those conditions.

"There is not one shred of doubt . . . about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury." *Blakely*, 542 U.S. at 313. The "Framers would not have thought it too much to demand that, before depriving a [citizen] of three

more years of liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of [her] equals and neighbours,' rather than a lone employee of the State." *Id.* at 313-14 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)).

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted.

DOUGLAS A. BERMAN
Ohio State University
Moritz College of Law
55 West 12th Ave.
Columbus, OH 43210
(614) 688-8690

ANDREW S. BUZIN
Counsel of Record
500 Fifth Ave.
45th Floor
New York, NY 10110
(212) 292-2679

AARON M. KATZ
Ropes & Gray LLP
One International Place
Boston, MA 02110
(617) 951-7117

CARISSA B. HESSICK
Griswold 1 North
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 384-7876

Attorneys for Petitioner

January 17, 2007

APPENDIX

APPENDIX A
FOURTH CIRCUIT OPINION

2006 U.S. App. LEXIS 23797, 2006 WL 2683300

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-5168

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CELESTINE FAULKS,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Rebecca Beach Smith, District Judge. (CR-97-146)

Submitted: Aug. 31, 2006 Decided: Sept. 19, 2006

Before MOTZ, TRAXLER, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Timothy V. Anderson, ANDERSON GOOD, Virginia Beach, Virginia, for Appellant. Alan Mark Salsbury, Assistant United States Attorney, Norfolk, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Celestine Faulks appeals the district court's order revoking her supervised release and sentencing her to thirty-six months' imprisonment. Faulks' attorney filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 744 (1967), stating that there were no meritorious issues to raise on appeal, but arguing the supervised release statute, 18 U.S.C. § 3583 (2000) is unconstitutional under *Booker*,* and that it was improper for the district court to conduct the supervised release revocation hearing prior to Faulks being tried and convicted in state court. In her pro se supplemental brief, Faulks further contends that the Government presented insufficient evidence to support the district court's finding that she engaged in criminal conduct violative of the terms of her supervised release. Because our review of the record discloses no meritorious issues and no error by the district court, we affirm the revocation order and the sentence imposed.

We reject Faulks' constitutional claim as there is no basis in law to support the argument that *Booker* invalidated the supervised release statute, 18 U.S.C. § 3583 (2000), or rendered it unconstitutional. See *Booker*, 543 U.S. at 258 (enumerating those portions of the Sentencing Reform Act that were still valid, including the supervised release statute); *United States* v. *Huerta-Pimental*, 445 F.3d 1220, 1224 (9th Cir. 2006) (holding that "[b]ecause the revocation of supervised release and the subsequent imposition of additional imprisonment is, and always has been, fully discretionary, it is constitutional under

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* *United States* v. *Booker*, 543 U.S. 220 (2005).

Booker").

We also reject Faulks' assertion that the district court erred in conducting the violation hearing before Faulks was tried in state court. As the district court noted, the supervised release violation hearing was completely separate and distinct from any state court proceeding that may arise, and the court's findings had no impact or res judicata effect thereon.

We further reject the contention that the Government's proof was insufficient to support the district court's decision. The Government presented the testimony of several women who explained the fraudulent scheme masterminded by Faulks and her role therein. The district court was well within bounds to reject Faulks' version of events—as well as her claim that another woman was the true perpetrator of the fraud—as incredible.

Lastly, though Faulks does not expressly challenge the duration of her sentence, we find the sentence was reasonable. As we recently discussed in *United States* v. *Crudup*, ___ F.3d ___, 2006 WL 2243586 (4th Cir. 2006), we review sentences imposed upon the revocation of supervised release to determine whether the sentence is "plainly unreasonable." Because Faulks' sentence was within the applicable statutory maximum, and neither procedurally nor substantively unreasonable, we find it was not plainly unreasonable. In imposing this sentence, the district court adequately considered the policies underlying the supervised release statute, the various applicable sentencing factors, and the available sentencing options.

As required by *Anders*, we have reviewed the entire record and have found no meritorious issues

for appeal. Accordingly, we affirm the district court's order revoking Faulks' supervised release and imposing a thirty-six-month sentence. This court requires that counsel inform hi client, in writing, of her right to petition the Supreme Court of the United States for further review. If the client requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on the client. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

Affirmed

APPENDIX B
18 U.S.C. §3583

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general. The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)].

(b) Authorized terms of supervised release. Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the

factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)].

(d) Conditions of supervised release. The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)] that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 [42 USCS § 14135a]. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests

thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4) [18 USCS § 3563(a)(4)]. The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) [18 USCS § 3583(g)] when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D) [18 USCS § 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D)]; and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20) [18 USCS § 3563(b)(1)-(b)(10) and (b)(12)-(b)(20)], and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation. The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1),(a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)]—

(1) terminate a term of supervised release and discharge the defendant released at any time after

the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions. The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing. If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title [18 USCS § 921], in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of

imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation. When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation. The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates. Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) [18 USCS § 2332b(g)(5)(B)] is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 [18 USCS § 1201] involving a minor

victim, and for any offense under section 1591, 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425 [18 USCS § 1591, 2241, 2242, 2244(a)(1), 2244(a)(2), 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425], is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591 [18 USCS §§ 2241 et seq., 2251 et seq., 2421 et seq., 1201, or 1591], for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

Supreme Court, U.S.
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(2)

No. 06-999

In the Supreme Court of the United States

CELESTINE FAULKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
NINA GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the procedural requirements of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), precluded the district court from finding, by a preponderance of the evidence, that petitioner had violated a condition of supervised release, and then requiring her to serve a term of imprisonment upon revocation of her supervised release.

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In the Supreme Court of the United States

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CELESTINE FAULKS, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 195 Fed. Appx. 196.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2006. On December 12, 2006, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 17, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiracy to defraud a financial institution, in violation of 18 U.S.C. 371, and bank fraud, in-

violation of 18 U.S.C. 1344. C.A. App. 4-5, 12. She was sentenced to 30 months of imprisonment, to be followed by five years of supervised release. *Id.* at 13-14. After her release from prison, petitioner violated the terms of her supervised release. Pet. App. 2a. The district court revoked petitioner's supervised release and ordered her to serve an additional 36 months of imprisonment. *Ibid.* The court of appeals affirmed. *Id.* at 1a-4a.

1. In 1996, petitioner recruited individuals to open accounts at federally insured credit unions. Petitioner deposited worthless checks drawn on closed accounts or accounts with insufficient funds into those credit union accounts. Then, at petitioner's direction, the credit union account holders made cash withdrawals or obtained cashier's checks and gave the money to petitioner. Presentence Investigation Report ¶¶ 4-10 (PSR).

In 1998, petitioner was convicted of conspiracy to defraud a financial institution, in violation of 18 U.S.C. 371, and bank fraud, in violation of 18 U.S.C. 1344. C.A. App. 12. The PSR determined that petitioner's total offense level was 17, her criminal history category was I, and the resulting Sentencing Guidelines range was 24 to 30 months of imprisonment. PSR ¶¶ 66-68. The district court sentenced petitioner to 30 months of imprisonment. C.A. App. 13, 18. The court explained that it was sentencing petitioner "at the high end of the guideline range because she did not accept any responsibility for her crimes, the crimes were committed over a significant period of time, and [petitioner] had recruited others to participate in the bank fraud scheme." *Id.* at 18.[1]

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[1] In an interview with the probation officer, petitioner claimed that a neighbor who resembled her had committed the crimes, that photographs introduced at trial were actually pictures of the neighbor, and that petitioner's fingerprints were found on one of the checks used in

2. In July 2000, petitioner was released from prison and began to serve her term of supervised release. C.A. App. 19-20. On May 16, 2005, the United States Probation Office filed a petition to revoke petitioner's supervised release. *Id.* at 19-22. The petition alleged that petitioner had violated a condition of that release requiring her not to "commit another federal, state, or local crime." *Id.* at 14; see *id.* at 19-22. The petition explained that petitioner had been charged in Virginia state court with forgery, obtaining money under false pretenses, and uttering forged checks. See *id.* at 21-22.[2]

On November 9, 2005, the district court held a hearing to determine whether to revoke petitioner's supervised release. At the hearing, petitioner's counsel noted that petitioner had been indicted on state charges arising from "the same factual circumstances" that had prompted the revocation petition. C.A. App. 31. Counsel asked the district court to "defer[] [the supervised release revocation proceedings] pending the outcome[]" of the state criminal case. *Id.* at 35. Counsel expressed concern that, in order for petitioner to defend herself against the alleged supervised release violations, she "would have to waive her privilege against self-incrimination [and] expose herself to cross-examination under oath," and her testimony could then be used against her in the state court proceedings. *Id.* at 31-32. The district court refused to postpone the revocation hearing. The court explained that the state criminal prosecution and

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the commission of the offenses because the neighbor had given petitioner the check. PSR ¶ 16.

[2] The Probation Office subsequently submitted an addendum to the petition which noted that petitioner had been indicted by a state grand jury on the forgery and uttering charges. C.A. App. 23-24; see *id.* at 34-35.

the federal supervised release revocation proceedings were "separate matters" and that the preponderance-of-the-evidence standard, not the beyond-a-reasonable-doubt standard applicable in criminal trials, applied in revocation proceedings. *Id.* at 33-34; see *id.* at 176-177 (observing that "these proceedings are not controlling [in the state case] and cannot be used as any evidence of guilt on any criminal proceedings").

After hearing testimony from several witnesses, C.A. App. 36-120, the court found that the preponderance of the evidence established that petitioner had obtained an ATM card and PIN number from a woman named Violet Blow, had deposited two checks drawn on a closed bank account into Blow's account at Wachovia Bank, and had directed Blow to withdraw the funds the following morning, while petitioner waited outside the bank. *Id.* at 180-187. Petitioner, testifying on her own behalf, denied any involvement in the scheme. *Id.* at 149-150. She contended that another woman, Leslie Williams, had committed the offenses. *Id.* at 173-175, 178. Petitioner testified that bank surveillance photographs of the person who deposited the second check resembled Williams. *Id.* at 151-153.[3] Petitioner further claimed that the government's witnesses were "all Leslie Williams' friends." *Id.* at 157.[4]

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[3] Several of petitioner's relatives and friends also testified that the bank photos did not appear to be petitioner. C.A. App. 122-123, 133-134, 139, 141, 145, 148.

[4] Petitioner also testified that her wallet had been stolen and that another person told her that Williams had the wallet. C.A. App. 153-154. Petitioner acknowledged, however, that there was no suggestion that her identification was used in any of the bank transactions. *Id.* at 160-161.

The district court found that petitioner was not a "believable witness." C.A. App. 180. After "dealing with [petitioner] for years," the court was "one hundred percent sure" and "would find * * * beyond a reasonable doubt" that petitioner was the person pictured in the bank surveillance photos. *Id.* at 184-185. The court concluded that petitioner had committed the supervised release violations, revoked petitioner's supervised release, and ordered her to serve an additional 36 months of imprisonment. *Id.* at 185-187, 193; see *id.* at 201-203 (Order).

At a hearing on petitioner's motion for reconsideration of the revocation order, Leslie Williams testified that she had not deposited checks into or withdrawn funds from Violet Blow's bank account. C.A. App. 220-221. In denying petitioner's reconsideration motion, the district court found that Williams "does not have the same physical characteristics as [petitioner] or the individual in the surveillance photographs." *Id.* at 232-233 & n.1. In particular, the court noted, petitioner is "older (by about twenty years), is much thinner, and has a lighter complexion" than Williams. *Id.* at 232 n.1.

3. On appeal, petitioner's counsel filed a brief pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), in which he argued that the imposition of an additional term of imprisonment following the revocation of petitioner's supervised release was unconstitutional under *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). Pet. App. 2a; see Pet. C.A. Br. 7-13. Petitioner filed a pro se supplemental brief in which she challenged the sufficiency of the evidence supporting the district court's revocation ruling. Pet. App. 2a.

The court of appeals affirmed the district court's judgment in an unpublished, per curiam opinion. Pet. App. 1a-4a. The court rejected the argument that the supervised release revocation and additional sentence were unconstitutional under *Blakely* and *Booker*. *Id.* at 2a. The court observed that this Court's opinion in *Booker* had included the supervised release statute, 18 U.S.C. 3583, in a listing of provisions of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, that remained valid after the Court's decision. Pet. App. 2a (citing *Booker*, 543 U.S. at 258). The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence to support the revocation decision. *Id.* at 3a. Noting that the government had presented the testimony of several witnesses "who explained the fraudulent scheme masterminded by [petitioner] and her role therein," the court concluded that the district court was "well within bounds" in rejecting as "incredible" petitioner's claim that Williams had perpetrated the fraud. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 7-29) that the district court's conduct of supervised release revocation proceedings leading to the revocation of supervised release and the imposition of a sentence of imprisonment was contrary to *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004). Those cases require that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States* v. *Booker*, 543 U.S.

220, 244 (2005). Petitioner claims that the finding that she violated her supervised release subjected her to criminal punishment not authorized by the jury verdict on her underlying offenses, and the supervised-release violation was not charged by indictment or proved to a jury beyond a reasonable doubt. The court of appeals correctly rejected that claim, and it does not warrant this Court's review.

1. At petitioner's initial sentencing for her conspiracy and bank fraud convictions, the district court had authority to "include as a part of the sentence" a term of supervised release. 18 U.S.C. 3583(a). During a supervised release term, the defendant is required to comply with court-imposed conditions. 18 U.S.C. 3583(d). If the district court "finds by a preponderance of the evidence that the defendant violated a condition of supervised release," the court is authorized to "revoke [the] term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release," up to specified limits based on the seriousness of the underlying offense. 18 U.S.C. 3583(e)(3).

Those provisions of Section 3583 were in effect when petitioner committed her offenses of conviction in 1996. Therefore, the statutory maximum sentence that petitioner could have received for those offenses included a 30-year term of imprisonment on the bank fraud count, see 18 U.S.C. 1344, a five-year term of imprisonment on the conspiracy count, see 18 U.S.C. 371, a five-year term of supervised release, see 18 U.S.C. 3583(b)(1), and an additional three-year term of imprisonment if she violated any condition of her supervised release, see 18 U.S.C. 3583(e)(3). Petitioner was sentenced within that

statutory maximum to an initial 30-month term of imprisonment and a five-year term of supervised release, followed by an additional three-year term of imprisonment, when it was established that she had committed violations of her supervised release conditions. There was no *Apprendi* error.

Petitioner's contention (Pet. 22-29) that imposition of the additional three-year term of imprisonment was unconstitutional under *Apprendi* lacks merit. A proceeding to revoke a defendant's term of supervised release is fundamentally different from an initial sentencing proceeding. Unlike initial sentencing, the revocation of supervised release does not impose punishment for a new offense. Instead, the revocation of supervised release modifies the already-authorized punishment for an earlier offense—the offense of conviction. Because the revocation of supervised release does not impose any punishment that is not already authorized by the jury verdict on the underlying offense, it does not implicate *Apprendi*.

Although this Court has applied the *Apprendi* rule to a variety of sentencing regimes, the Court has never extended the rule beyond initial sentencing proceedings. See *Apprendi*, 530 U.S. at 468-469 (statutory enhancement to sentence); *Ring* v. *Arizona*, 536 U.S. 584, 592-595 (2002) (capital sentencing); *Blakely*, 542 U.S. at 299-300 (determinate sentencing guidelines); *Booker*, 543 U.S. at 227-229 (same). Moreover, the Court made clear in *Booker* that there is no constitutional defect in the statutory provisions permitting violations of supervised release to be found by the district court by a preponderance of the evidence. The Court noted that many provisions of the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, are "perfectly valid" notwithstand-

ing the *Booker* decision, and it specifically listed the supervised release statute, 18 U.S.C. 3583, as an example of a valid provision. See *Booker*, 543 U.S. at 258.

Petitioner's contrary view depends on the premise that a district court, when revoking supervised release and reimprisoning a defendant, imposes punishment for the violation of supervised release. That premise is incorrect. In *Johnson* v. *United States*, 529 U.S. 694 (2000), decided just one month before *Apprendi*, this Court noted the "serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release." *Id.* at 700. One of several constitutional problems that would be raised by that approach, the Court explained, is the fact that "the violative conduct * * * need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Ibid.* The Court concluded that "[t]reating postrevocation sanctions as part of the penalty for the initial offense * * * avoids these difficulties. * * * We therefore attribute postrevocation penalties to the original conviction." *Id.* at 700-701. Thus, rather than punishing a defendant for violating a condition of supervised release, revocation of supervised release is part of the authorized punishment imposed for the underlying offense. See, *e.g.*, *United States* v. *Fareed*, 296 F.3d 243, 247 (4th Cir.) (noting that this Court "held in *Johnson* that post-revocation prison sentences are sentences for the original federal crime, not punishment for the violation of the terms of supervised release"), cert. denied, 537 U.S. 1037 (2002).[5]

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[5] For that reason, the revocation of supervised release is quite different from the criminal contempt fines at issue in *International*

Consequently, when a defendant is convicted of an offense and receives a term of supervised release, the maximum term of imprisonment to which he is exposed is already established, based on his admissions or a jury verdict, to include time in prison if supervised release is revoked. The revocation of supervised release does not enlarge the defendant's maximum potential prison term. Instead, it represents the withdrawal of the right to continue on a release status that was conditional at the outset. See *United States* v. *Huerta-Pimental*, 445 F.3d 1220, 1225 (9th Cir.) ("[I]mposition of imprisonment following the revocation of supervised release is part of the original sentence authorized by the fact of conviction and does not constitute additional punishment beyond the statutory maximum."), cert. denied, 127 S. Ct. 545 (2006).[6]

Union, United Mine Workers v. *Bagwell*, 512 U.S. 821 (1994), on which petitioner relies (Pet. 9-10, 28). In that case, the Court concluded that fines of $52 million were "criminal," and triggered the right to trial by jury, in part because they punished the union for violating an injunction entered by the district court. *Bagwell*, 512 U.S. at 826-830, 837-838. The imprisonment imposed upon revocation of supervised release, in contrast, does not punish the defendant for violating the terms of supervised release. Instead, it is part of the punishment authorized for the underlying offense, and a defendant enjoys the right to a jury trial before that punishment may be imposed.

[6] Petitioner asserts that her "1998 conviction authorized a maximum sentence under the then-mandatory Guidelines of 30 months' imprisonment." Pet. 23. By modifying the Sentencing Reform Act to make the Guidelines advisory, however, *Booker* remedied the constitutional problem presented by the mandatory Guidelines. See *Booker*, 543 U.S. at 258-260. Thus, the maximum sentence authorized by the jury verdict in a federal criminal case is now the statutory maximum for the offense under the United States Code. To the extent that petitioner's argument is based on the fact that she was convicted and sentenced before the decision in *Booker*, when the effective maximum was lower than the

In that respect, the revocation of supervised release is comparable to the revocation of parole or probation rather than initial criminal sentencing. See *Johnson*, 529 U.S. at 710-711 (noting the "similarity" between supervised release and parole); see also, *e.g.*, *United States* v. *Hall*, 419 F.3d 980, 985 n.4 (9th Cir.) ("Parole, probation, and supervised release revocation hearings are constitutionally indistinguishable and are analyzed in the same manner."), cert. denied, 126 S. Ct. 838 (2005); *United States* v. *Jones*, 299 F.3d 103, 109 (2d Cir. 2002) ("[T]he constitutional guarantees governing revocation of supervised release are identical to those applicable to revocation of parole or probation."). In parole or probation revocation proceedings, the full sweep of rights associated with a criminal trial does not apply. See, *e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972) ("[R]evocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973) ("Probation revocation, like parole revocation, is not a stage of a criminal prosecution."). Likewise, the Sixth Amendment rights accorded in a criminal prosecution do not apply to supervised release revocation. See *United States* v. *Carlton*, 442 F.3d 802, 809 (2d Cir. 2006) ("[I]t is evident that the constitutional rights afforded a defendant subject to revocation of supervised release for violation of its conditions are not co-extensive with those enjoyed by a suspect to whom the presumption of innocence attaches."); *United States* v. *Work*, 409 F.3d 484, 491 (1st Cir. 2005) ("The law is clear that once the origi-

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maximum specified by statute, petitioner presents a transitional issue that is of diminishing importance and does not warrant this Court's review.

nal sentence has been imposed in a criminal case, further proceedings with respect to that sentence are not subject to Sixth Amendment protections.").

That conclusion is consistent with the established understanding that parole, probation, or "a sentence of supervised release by its terms involves a surrender of certain constitutional rights." *Carlton*, 442 F.3d at 809. See, *e.g.*, *United States* v. *Knights*, 534 U.S. 112, 119 (2001) ("Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled.") (internal quotation marks and citation omitted). Part of the punishment entailed by parole, probation, or supervised release is the imposition of "reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Ibid.* And "it has long been understood that a fundamental and unchallenged condition of probation is that the probationer surrender his right to trial by jury should the government seek revocation, and thus imprisonment." *United States* v. *Cranley*, 350 F.3d 617, 621 (7th Cir. 2003). Likewise, one of the conditions placed on a defendant's liberty in supervised release is that the supervised release may be revoked and imprisonment reimposed based on a judicial finding by a preponderance of the evidence of a violation of the terms of that release. See 18 U.S.C. 3583(e)(3).

Petitioner's proposed extension of *Apprendi* to supervised release revocation proceedings would seriously undermine the government's interest in effectively supervising prisoners following their release from imprisonment. See, *e.g.*, *Samson* v. *California*, 126 S. Ct. 2193, 2200 (2006) (emphasizing importance of State's "interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers

and parolees"); *United States* v. *Johnson*, 529 U.S. 53, 59 (2000) ("Congress intended supervised release to assist individuals in their transition to community life."). The difficulties that petitioner's approach would create are well illustrated by her contention (Pet. 26-27) that her supervised release violations should have been charged by indictment. That would indeed be a necessary consequence of a holding that *Apprendi* applies. See *United States* v. *Cotton*, 535 U.S. 625, 627 (2002). But indicting a defendant for a supervised release violation would conflict with the settled understanding that such revocation does not punish the defendant for a new offense. See *Johnson*, 529 U.S. at 700. It would also produce the anomaly that, if the supervised release violation truly increased the punishment for the underlying offense, as petitioner's *Apprendi* argument implies, the indictment for the original offense would have to include that fact. But that would not be possible, because the supervised release violation does not occur until after conviction.

The implications of petitioner's theory could extend far beyond proceedings governing the revocation of supervised release. The factual determinations supporting revocation of probation and parole would likely become subject to *Apprendi* as well.[7] Indeed, the institution of parole itself could be swept into the Sixth Amendment.

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[7] Although petitioner asserts that "supervised release is fundamentally distinguishable from parole" (Pet. 17), the formal declaration by a State to a parolee that the individual remains in "legal custody" (Pet. 12 n.12) (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 122 (1983)) does not seem a particularly significant factor under a doctrine whose "relevant inquiry is not one of form, but of effect." Pet. 25 (quoting *Apprendi*, 530 U.S. at 494). And petitioner makes no effort to distinguish revocation of probation from revocation of supervised release.

Although the decision to release a prisoner on parole is generally discretionary, there may be factual findings that must accompany any decision to grant or withhold parole. Petitioner's proposed theory might well apply to such findings. Similarly, the facts supporting prison disciplinary proceedings that result in the withdrawal of good-time credits might also fall within *Apprendi*'s domain if petitioner's theory were accepted. Those potential outcomes counsel against extending *Apprendi* to post-sentencing determinations that have an effect on the amount of prison time served.

2. a. Every court of appeals that has addressed the issue has held that *Apprendi* does not apply to revocation of a defendant's supervised release followed by imposition of an additional term of imprisonment. See *United States* v. *Dees*, 467 F.3d 847, 854-855 (3d Cir. 2006), petition for cert. pending, No. 06-10826 (filed Apr. 18, 2007); *United States* v. *Cordova*, 461 F.3d 1184, 1186-1188 (10th Cir. 2006); *Huerta-Pimental*, 445 F.3d at 1223-1225; *Carlton*, 442 F.3d at 807-810; *United States* v. *Hinson*, 429 F.3d 114, 116-119 (5th Cir. 2005), cert. denied, 126 S. Ct. 1804 (2006); *Work*, 409 F.3d at 489-492; *United States* v. *Coleman*, 404 F.3d 1103, 1104-1105 (8th Cir. 2005) (per curiam); Pet. App. 2a.

Petitioner attempts to undermine that uniform conclusion by arguing (Pet. 7, 14-19) that the courts of appeals have taken "conflicting approaches" in reaching the same result. That is incorrect. Although the courts of appeals have sometimes advanced different reasons for their common conclusion, there is no inconsistency in the reasons on which the courts have relied. In any event, any divergence in reasoning does not change the essential fact that the holdings of all the courts of appeals are identical: *Apprendi* does not constrain the

revocation of supervised release, and Section 3583(e)(3) is constitutional. This Court "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). Absent disagreement among the circuits about the constitutionality of Section 3583(e)(3), this Court's review is not warranted.

b. Petitioner also contends (Pet. 19-22) that the court of appeals' decision conflicts with several state-court decisions. None of the cases on which petitioner relies is a decision of a state court of last resort, however, and thus any conflict between one of those decisions and the decision below would not warrant the exercise of this Court's certiorari jurisdiction. See Sup. Ct. R. 10(a). In any event, there is no conflict. None of the state-court decisions addresses the constitutionality of the federal supervised release statute or any analogous question.

State v. *Buehler*, 136 P.3d 64 (Or. Ct. App. 2006), on which petitioner principally relies, did not involve a challenge to a sentence imposed after revocation of a term of probation or supervised release. Instead, the court held that the defendant's *original* sentence violated *Blakely* and *Apprendi* because the trial court departed upward from a presumptive sentence of probation to a sentence of imprisonment based on facts that were not admitted by the defendant or found by a jury. *Id.* at 65-66. Similarly, both *State* v. *Gibson*, No. 05 COA 032, 2006 WL 2256994 (Ohio Ct. App. Aug. 8, 2006) (unpublished), and *State* v. *McMahan*, 621 S.E.2d 319 (N.C. Ct. App. 2005), review allowed, 640 S.E.2d 390 (N.C. 2006), involved challenges to the sentences imposed at the defendants' *original* sentencing proceedings. Neither case involved a claim that *Apprendi* requires the finding that the de-

fendant violated the conditions of probation to be made by a jury beyond a reasonable doubt.

Likewise, in *State* v. *Beaty*, 696 N.W.2d 406 (Minn. Ct. App. 2005), the defendant did not contend that *Apprendi* applied to the trial court's finding that he violated the conditions of his probation. On the contrary, the defendant "admitted the violations," *id.* at 408, and instead raised a standard *Blakely* challenge to the sentence imposed. He argued that the sentence "was an upward durational departure from the presumptive guidelines sentence," and the facts supporting the departure therefore should have been found by the jury. *Id.* at 408, 412. Unlike the defendant in *Beaty*, petitioner does not claim that the district court erred in sentencing her above the advisory Sentencing Guidelines range.[8]

Nor does *State* v. *France*, No. E2003-01293-CCA-R3CD, 2004 WL 1606987 (Tenn. Crim. App. July 19, 2004) (unpublished decision), conflict with the decision in this case. In *France*, the court merely noted that *Blakely* "call[ed] into question" the validity of the State's overall sentencing scheme. *Id.* at *2 n.1. The court's actual holding was based entirely on unrelated state-law grounds. *Id.* at *4-*5.

3. Even if the *Apprendi* question that petitioner raises otherwise warranted this Court's review, this case would be an inappropriate vehicle for resolving it. Petitioner forfeited the claim that the revocation of her su-

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[8] Chapter 7 of the Sentencing Guidelines, which applies to violations of probation or supervised release, was understood as advisory even before *Booker*. See, *e.g.*, *Huerta-Pimental*, 445 F.3d at 1224 ("Because the revocation of supervised release and the subsequent imposition of additional imprisonment is, and always has been, fully discretionary, it is constitutional under *Booker*.").

pervised release and the imposition of an additional term of imprisonment violated *Apprendi* because she did not raise that claim in the district court. Petitioner did not cite *Apprendi*, *Blakely*, or *Booker* during the supervised release proceedings, and did not contend that the proceedings violated her Fifth Amendment right to a grand jury indictment or her Sixth Amendment right to a jury finding of guilt beyond a reasonable doubt. See C.A. App. 31-35. Instead, petitioner requested that the court "defer[]" the revocation hearing pending resolution of the state charges against her, on the ground that her testimony at the revocation hearing might be viewed as a waiver of her Fifth Amendment privilege against self-incrimination, permitting that testimony to be used against her in the state prosecution. *Id.* at 31-32, 35.

Because petitioner did not preserve her *Apprendi* claim in the district court, that claim may be reviewed only for plain error. Fed. R. Crim. P. 52(b). Under the plain error standard, an error does not warrant reversal on appeal unless a defendant can show that it was "clear" or "obvious" and affected his substantial rights. *United States* v. *Olano*, 507 U.S. 725, 732-734 (1993). Even then, reversal is not warranted unless the defendant can show that the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.* at 736.

Petitioner cannot satisfy that standard. Even assuming *arguendo* that the district court's imposition of an additional term of imprisonment based on its finding of a supervised release violation was error, the error was not plain. This Court has never extended *Apprendi* beyond initial sentencing proceedings, and the Court in *Booker* deemed the supervised release provisions "perfectly valid." *Booker*, 543 U.S. at 258. In light of the

uniform authority in the courts of appeals holding that the revocation of supervised release does not implicate *Apprendi*, any error cannot have been "clear" or "obvious." *Olano*, 507 U.S. at 734.

Moreover, petitioner could not establish that any error affected her substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Petitioner did not contest the government's evidence showing that worthless checks were deposited into an account at Wachovia Bank or that funds were withdrawn from the account illegally. The only fact in dispute at the supervised release revocation hearing was whether the person pictured in bank surveillance photos depositing one of the checks was petitioner or was instead Leslie Williams, as petitioner claimed. In light of the district court's findings on the differences in age and appearance between petitioner and Williams, and the court's conclusion "beyond a reasonable doubt" that petitioner was the person depicted in the bank photos, C.A. App. 184-185, 232-233 & n.1, petitioner's claim of mistaken identity was insufficient to raise a serious dispute about her involvement in the illegal bank transactions. Cf. *Cotton*, 535 U.S. at 633 (fourth component of plain-error test not satisfied when relevant fact is "essentially uncontroverted") (quoting *Johnson* v. *United States*, 520 U.S. 461, 470 (1997)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

NINA GOODMAN
Attorney

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No. 06-999

In the Supreme Court of the United States

CELESTINE FAULKS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DOUGLAS A. BERMAN
Ohio State University
Moritz College of Law
55 West 12th Ave.
Columbus, OH 43210
(614) 688-8690

ANDREW S. BUZIN
Counsel of Record
500 Fifth Avenue
45th Floor
New York, NY 10110
(212) 292-2679

AARON M. KATZ
Ropes & Gray LLP
One International Place
Boston, MA 02110
(617) 951-7117

CARISSA B. HESSICK
ROBERT JACKSON, JR.
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 384-7876

Counsel for Petitioner

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The Government does not dispute that Judge Rebecca Beach Smith "could not have sentenced" Faulks to three years' confinement "without finding the additional fact" that Faulks had committed a state crime, *Cunningham* v. *California*, 127 S. Ct. 856, 865 (2007), or that the Fourth Circuit rejected on the merits Faulks's claim that the imposition of that punishment violated her right to trial by jury. Instead, the Government continues to press arguments that this Court repeatedly has rejected in holding that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely* v. *Washington*, 542 U.S. 296, 313 (2004). The Government's analysis demonstrates that this Court's intervention is necessary to prevent the continued imposition of lengthy punishments solely on the basis of judicial factfinding.

I. FAULKS'S CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED.

The Government, perhaps recognizing that its position on the merits is untenable, asserts at the close of its brief that this case is "an inappropriate vehicle" for resolving the questions presented because Faulks has "forfeited" her claim. Opp. 16. This assertion is inconsistent with the proceedings in the district court, the Government's submission in the Court of Appeals, and the Fourth Circuit's decision on the merits.

1. ***The claim was preserved in the district court.*** At the outset of the revocation proceeding, Faulks's counsel requested that a jury resolve the

allegations against her. C.A. App. 31-33. Judge Smith responded that the "burden of proof on federal violations is by a preponderance of the evidence," and "in a criminal trial is beyond a reasonable doubt," and that revocation and a "criminal trial . . . are separate matters." *Id.* at 34. This colloquy demonstrates that Judge Smith considered and rejected the claim raised here.[1] See *Cool* v. *United States*, 409 U.S. 100, 102 n.2 (1972) (claim preserved because trial judge's "colloquy with the defense attorney" demonstrated that the court "understood" the objection). Insofar as Judge Smith's responses to the objection are identical to the Government's arguments in this Court, Opp. 11, the Government's belated assertion that the claim is unpreserved is particularly puzzling.

2. ***The Government has waived its forfeiture claim.*** Before the Fourth Circuit, and in response to Faulks's *pro se* and counseled briefs urging that her sentence violated the Sixth Amendment, the Government did not contest that Faulks's objection had preserved the issue.[2] The Government has therefore waived that contention. See, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 491 (2d Cir. 1994)

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[1] Judge Smith added, "I ~~frankly am~~ not going to hold [the proceeding] up any further"; counsel again noted his "exception for the record." C.A. App. 34, 35. In case any doubt remained that the court was apprised of the objection, Faulks *personally* asserted that she was entitled to, and had been denied, a "fair trial," *id.* at 188; see *United States* v. *Sanders*, 247 F.3d 139, 147 (4th Cir. 2001) (*Apprendi* "dictates what fact-finding procedure must be employed to ensure a fair trial").

[2] As the Fourth Circuit had not yet decided the Sixth Amendment issue raised here, the Government had every incentive to argue that Faulks had not preserved her claim.

("[The waiver] principle is also applicable to the Government when it has neglected to argue on appeal that a defendant has failed to preserve a given argument in the district court"; in that situation, "courts have consistently held that the Government has 'waived waiver'") (collecting cases).[3] The Government's attempt to revisit the adequacy of Faulks's objection is especially ironic because it contradicts the Government's analysis at the certiorari stage in *United States* v. *Booker*, 543 U.S. 220 (2005). Reply Brief for the United States in Support of Pet. for Cert. in *United States* v. *Booker*, No. 04-104 (assuring the Court that Booker's case was an appropriate vehicle for certiorari review, notwithstanding that Booker had not raised his claim in the district court, because the Government had waived forfeiture by failing to raise it in the Seventh Circuit).[4]

3. ***The Fourth Circuit ruled on the merits.*** The Court of Appeals rejected Faulks's claim as a

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[3] Because the Government failed completely to brief the issue below, the Fourth Circuit would have refused to consider the Government's waiver argument even if it had been proffered at oral argument in that court. See, *e.g.*, *United States* v. *Metzger*, 3 F.3d 756, 757 (4th Cir. 1993). The Government's reliance in this Court on an argument that would have been held waived *below* is particularly inappropriate.

[4] The Court properly accepted the Government's analysis, engaging in plenary review of claims Booker did not raise in the district court. Compare *United States* v. *Booker*, 357 F.3d 508, 515 (7th Cir. 2004) ("Because the Government does not argue that Booker's Sixth Amendment challenge to the Guidelines was forfeited by not being made in the district court, we need not consider the application of the doctrine of plain error") with *Booker*, 543 U.S. at 220 (exercising plenary review of Booker's claims).

matter below, nowhere suggesting that her objection was insufficient to preserve her claims for purposes of appeal. Pet. App. 2a; see *Sabbath* v. *United States*, 391 U.S. 585, 588 n.1 (1968) (rejecting the Government's contention that petitioner "failed to adequately raise" an objection; when "the Court of Appeals [has] decided the issue on the merits . . . we are justified in likewise doing so"). As this Court has long recognized, "[i]t suffices for our purposes that the court below passed on the issue presented." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 (1991).

II. THE GOVERNMENT'S ANALYSIS, LIKE THAT OF THE COURTS OF APPEALS, IS IRRECONCILABLE WITH *APPRENDI* AND *BLAKELY*.

In urging that "the Sixth Amendment [does] not apply to supervised release revocation" proceedings, Opp. 11, the Government, like the courts of appeals, advances positions this Court has squarely rejected in favor of a "'bright-line rule'" that "facts essential to punishment [may not be] reserved for determination by the judge." *Cunningham*, 127 S. Ct. at 869.[5] The parties agree that Faulks's sentence was authorized solely by judicial factfinding. "'[T]hat should be the end of the matter.'" *Id.* at 873 (quoting *Blakely*, 530 U.S. at 490).

1. *Legislative labeling.* The Government contends that *Blakely* applies only to "initial sentencing proceedings," Opp. 8, reminiscent of its assertion in *Apprendi* v. *New Jersey*, 530 U.S. 466

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[5] Tellingly, the Government fails even to cite *Cunningham*.

(2000), that the jury-trial guarantee had "never been applied at sentencing." Brief for the United States as *Amicus Curiae* in *Apprendi* v. *New Jersey*, No. 99-478. But it is the punishment imposed—not the label given to the proceeding at which judicial factfinding occurs—that is constitutionally relevant. *Blakely*, 542 U.S. at 303; *Ring* v. *Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("[T]he fundamental meaning of the jury-trial guarantee" "is that all facts essential to the imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt").

2. ***Attributing new punishment to old proceedings.*** The Government contends that imprisonment for violations of supervised release is "already authorized by the jury verdict on the underlying offense." Opp. 8; contra 18 U.S.C. § 3583(e)(3) (requiring additional judicial factfinding). The Government previously has asked the Court to allow a "jury's finding of guilt" to "open[] the door to a long prison sentence." Brief for the United States as *Amicus Curiae* in *Apprendi* v. *New Jersey*, No. 99-478. The Court instead has held that the jury cannot be "relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306.

The Government relies on *Johnson* v. *United States*, 529 U.S. 694 (2000), for the similarly irrelevant proposition that punishment imposed upon revocation is "'attributed'" to the original conviction or "'part of the penalty for the initial

offense.'"[6] Opp. 9. The jury-trial right was not raised, implicated, or addressed by *Johnson*, Pet. 24-26, and the Government does not contend otherwise. In any event, *Johnson* did not suggest that the facts found by the jury are alone sufficient to authorize punishment at a revocation proceeding years later, and that contention is belied by plain statutory text. See 18 U.S.C. § 3583(e)(3) (making additional judicial factfinding prerequisite to the imposition of punishment). "Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge," "is the very inquiry *Apprendi*'s 'bright-line rule' was designed to exclude." *Cunningham*, 127 S. Ct. at 869.

3. ***Administrative crisis.*** The Government asserts that applying *Blakely* here "would seriously undermine [its] interest in effectively supervising prisoners." Opp. 12. The Government repeatedly has failed to dissuade the Court from enforcing the jury-trial guarantee on such grounds. *Blakely*, 542 U.S. at 313 ("Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency . . . of criminal justice."). And, as in *Blakely*, the Government's efficiency concerns are

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[6] The Government's characterization of Faulks's punishment as a "modifi[cation]" of her original sentence, Opp. 8, is similarly irrelevant: Judge Smith, acting alone, "modified" Faulks's freedom into a three-year prison term. And the Government's supposed "established understanding" that a defendant's conviction results in a "'surrender'" of the right to trial by jury in subsequent proceedings, Opp. 12, is irreconcilable with both this Court's settled approach to Sixth Amendment waiver and the outcomes in *Apprendi* and *Blakely* themselves. Pet. 14.

entirely speculative.[7]

4. ***Unanimity in the lower federal courts.*** The Government asks the Court to disregard a clear violation of the Sixth Amendment because eight circuits have rejected this challenge under flawed and conflicting rationales. The unanimity of results in the courts of appeals, however, is a reason to grant rather than oppose certiorari here.

Review is warranted where a federal "court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The Fourth Circuit's decision and those of its sister circuits contradict both *Apprendi* and *Blakely*.[8]

The courts of appeals have hesitated before to apply *Apprendi* to modern sentencing reforms, and their opinions in this context leave no doubt that the circuits are similarly disinclined to apply *Blakely* to supervised release. The courts of appeals' unanimity is not indicative of the power of the Government's arguments but the lower courts' shared aversion to the imagined consequences of "implement[ing]"

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[7] Congress originally required violations to be proved to a jury, Pet. 8-9, and there is no evidence that this had any effect on the Government's ability to supervise former offenders.

[8] The Government attempts to obscure that Judge Smith found disputed facts, asserting that the "only fact in dispute . . . was whether the person depicted in [the] bank surveillance photos . . . was petitioner" and that this was not a "serious dispute." Opp. 18. Identity was the *critical* fact prerequisite to Faulks's three-year prison term; she disputed it, and her guilt, vigorously. Indeed, Faulks's counsel stated, "I would just say to the court that—and as an officer of the court, I mean this absolutely—I have looked, Your Honor, at [the Government's photographic evidence] . . . I mean, it is just—it does not bear any resemblance to [Faulks]. It really doesn't." C.A. App. 174.

Blakely "in a principled way." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring). Further deliberation among the few remaining circuits is unlikely to enlighten this Court's analysis.

"This Court has repeatedly held that . . . any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge." *Cunningham*, 127 S. Ct. at 863-64. That rule is regularly violated in revocation proceedings throughout the Nation. Only this Court's intervention will redress the routine abrogation of "a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition should be granted.

Respectfully submitted.

DOUGLAS A. BERMAN
Ohio State University
Moritz College of Law
55 West 12th Ave.
Columbus, OH 43210
(614) 688-8690

ANDREW S. BUZIN
Counsel of Record
500 Fifth Avenue
45th Floor
New York, NY 10110
(212) 292-2679

AARON M. KATZ
Ropes & Gray LLP
One International Place
Boston, MA 02110
(617) 951-7117

CARISSA B. HESSICK
ROBERT JACKSON, JR.
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 384-7876

Counsel for Petitioner

May 18, 2007